IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CINCINNATI INSURANCE COMPANY,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**No. 05-2074-CM**
WAL-MART STORES, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the court on defendant Wal-Mart Stores, Inc.'s ("Wal-Mart") Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (Doc. 46) and defendant Mass Connections, Inc.'s ("Mass Connections") Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. 44).

I. Procedural Background

Plaintiff Cincinnati Insurance Company's complaint requests declaratory judgment. Plaintiff claims that a commercial general liability insurance policy ("CGL policy") that it issued to defendant Mid-America Promotions, Inc. ("Mid-America") does not require plaintiff to defend or indemnify Wal-Mart or Mass Connections in connection with a lawsuit entitled *Debbie S. Lynn and Kevin D. Lynn v. Wal-Mart Stores, Inc.*, in the District Court of Caddo County, Oklahoma, Case No. CJ-2003-100 ("the underlying lawsuit"). Plaintiffs in the underlying lawsuit have sued for personal injuries arising out of an alleged slip and fall on April 1, 2001, in the Wal-Mart Super Center located in Anadarko, Oklahoma.

On August 25, 2005, plaintiff filed a motion for default judgment requesting the clerk to enter judgment by default against Mid-America because Mid-America had failed to answer, or otherwise appear. In the prayer for relief in plaintiff's motion for default judgment, plaintiff included language specifically requesting that the court find "[t]hat Cincinnati has no obligation under the Mid-America CGL Policy to defend or indemnify Wal-Mart or Mass Connections with respect to the underlying Lynn lawsuit." Neither Wal-Mart nor Mass Connections filed any pleading in support of or against plaintiff's motion for default judgment against Mid-America.

This court entered a Memorandum and Order on October 25, 2005 (Doc. 40), granting plaintiff's motion for default judgment. The court's Memorandum and Order also found that:

> 1. Plaintiff has no obligation under the Mid-America CGL Policy to defend or indemnify Wal-Mart or Mass Connections with respect to the underlying Lynn lawsuit; and
>
> 2. Plaintiff is entitled to all costs and attorneys fees allowed by law.

Defendants contend that, although plaintiff's motion for default judgment was solely against Mid-America, the court's Memorandum and Order has, in effect, denied Wal-Mart and Mass Connections the opportunity to present their defenses to plaintiff's claims and adjudicated the rights of both Wal-Mart and Mass Connections, even though both defendants have fully answered and appeared in these proceedings. Defendants claim that they should be entitled to contest the allegations in the complaint. Defendants also contend that the defenses of all of the defendants are closely related.

Defendants further argue that, in essence, Wal-Mart and Mass Connections are being sanctioned for Mid-America's failure to answer the complaint or otherwise appear in the lawsuit.[1] Wal-Mart and Mass Connections contend that, because they have answered, appeared and are not in default, there is no factual or legal basis for adjudicating the claims against them, and allowing plaintiff to avoid coverage merely because Mid-America failed to answer is patently unfair to both Wal-Mart and Mass Connections. Defendants argue that if Wal-Mart and/or Mass Connections are permitted to pursue their defenses and if the court were to find that, as a named insured, plaintiff had a duty to defend and indemnify Wal-Mart an/or Mass Connections under the CGL policy, then the default judgment entered against Mid-America would constitute an incongruous result, which is contrary to Kansas and Tenth Circuit law on this issue. Both defendants have requested that the default judgment either be amended or set aside on the basis of error and to prevent manifest injustice. Defendants have requested that, if the default judgment against Mid-America is not set aside, it should be amended to affect only the rights of Mid-America.

Plaintiff opposes defendants' motions and contends that the default judgment against Mid-America does not affect Wal-Mart's or Mass Connections' rights or preclude Wal-Mart or Mass Connection from arguing that the CGL policy provides them with coverage. Plaintiff contends that the default judgment only precludes Mid-America from asserting that plaintiff has any duties with respect to Mass Connections and Wal-Mart. Plaintiff argues that its claims against Mass Connections and Wal-Mart are separate and distinct from its claims against Mid-America and that there can be differing, yet consistent, outcomes in this case with respect to all of the defendants.

[1] In its pleadings, Wal-Mart has made the court aware that Mid-America is no longer conducting business and has no ability or intention to defend this case.

II. Standard for Motion to Reconsider

Pursuant to Local Rule 7.3, a party may file a motion asking a judge to reconsider an order made by that judge. However, the local rule specifies that "[m]otions seeking reconsideration of dispositive orders or judgment must be filed pursuant to Fed. R. Civ. P. 59(e) or 60." D. Kan. Rule 7.3(a). Motions for reconsideration "filed within ten days of the district court's entry of judgment . . . [are] treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e)." *Hatfield v. Bd. of County Comm'rs for Converse County*, 52 F.3d 858, 861 (10th Cir. 1995). However, motions filed outside the ten-day time period set for Rule 59(e) motions are examined under Rule 60(b). *United States v. Emmons*, 107 F.3d 762, 764 (10th Cir. 1997). Because both Wal-Mart's and Mass Connections' motions were filed withing ten business days after the entry of the court's October 25, 2005 Memorandum and Order, the court considers both of defendant's motions under Rule 59(e).

Whether to grant or deny a motion for reconsideration is committed to the court's discretion. *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir. 1988). In exercising that discretion, courts have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); *Burnett v. W. Res., Inc.*, 929 F. Supp. 1349, 1360 (D. Kan. 1996); *Marx v. Schnuck Mkts., Inc.*, 869 F. Supp. 895, 897 (D. Kan. 1994). "Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position or the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination." *Burnett*, 929 F. Supp. at 1360 (citing *Anderson v. United Auto Workers*, 738 F. Supp. 441, 442 (D. Kan. 1990); *Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116, 1117 (D. Kan. 1990)).

III. Analysis

Having reviewed the parties' arguments, the standards under Rule 59(e), and the applicable law, the court finds that defendants' motions for reconsideration have raised an issue of error and the need to prevent manifest injustice in this case. Specifically, because of the procedural posture of this case, and pursuant to the Tenth Circuit's holding in *Wilcox v. Raintree Inns of America, Inc.*, 1996 WL 48857 at *3 (10th Cir. Feb. 2, 1996), the court at this time sets aside the default judgment against Mid-America until such time as the claims against the remaining defendants are determined on the merits. If defendants prevail on the merits, the default judgment currently entered against Mid-America would create an inconsistent result among defendants with similar defenses. *See id.* (citing *Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1449, 1512 (11th Cir. 1984) (holding that when defendants are similarly situated, judgment should not be entered against a defaulting defendant if the other defendants prevail on the merits)).

IT IS THEREFORE ORDERED that defendant Wal-Mart Stores, Inc.'s Motion to Alter or Amend Judgment Pursuant to Rule 59(e) (Doc. 46) and defendant Mass Connections, Inc.'s Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. 44) are granted for the reasons set forth above.

IT IS FURTHER ORDERED that the court's October 25, 2005 Memorandum and Order (Doc. 40) granting default judgment to plaintiff against defendant Mid America Promotions, Inc. is hereby set aside pending the outcome of plaintiff's claims against the remaining defendants.

Dated this 25th day of August 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge